Supreme Court, U.S.
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No. ____

In The
**Supreme Court of the United States**

ROBERT B. SKLAROFF, M.D.
*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
*and*
PHILIP MORRIS INCORPORATED, ET AL.,
*Respondents.*

On Petition For A Writ Of Certiorari
To The Pennsylvania Supreme Court

# PETITION FOR A WRIT OF CERTIORARI ADDENDUM

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May 29, 2000

36pp

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Rule 14.1 (i) (vi) allows for submission of an Appendix that contains "any other material the petitioner believes essential to understand the petition." In addition to that which follows the Writ, these documents are felt to meet this criterion. The first represents a minor "typo"; the second represents the formal document filed in response to a related matter, and the third includes explanatory material unavailable elsewhere and complementary to legal arguments contained in the writ.

Specifically, use in the MSA of the Offset is unprecedented, as is illustrated by its sporadic appearance in other settings. Dr. Sklaroff's ability to participate in other causes of action would be significantly stifled were the MSA to be in-force. The Biester exception carries great implications, involving both taxpayer suits and that which relates to the UTPCPL. And cursory analysis of the MSA reveals fundamental flaws.

1. Erratum for Writ

Delete "'s" after "Sklaroff" (footnote #12, page #9).

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2. Sklaroff v. Fisher – Filing (starts on next page)

IN THE SUPERIOR COURT OF PENNSYLVANIA

ROBERT B. SKLAROFF, MD
*pro se*
--Plaintiff,

v.

PHILIP MORRIS, INC.,
--Defendant
SUPERIOR COURT
Docket No. 225 EDA-2000

Trial Court Docket:
May Term, 1999; No.2

# BRIEF OF PLAINTIFF, ROBERT B. SKLAROFF, MD, GENERATED IN THE FORMAT OF A PRINCIPAL BRIEF IN RESPONSE BOTH TO APPELLEE'S REPLY BRIEF AND TO APPELLEE'S MOTION TO QUASH APPEAL [COMPLYING WITH PAGE-LIMITS ASSOCIATED WITH REPLY-BRIEFS]

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# I. INTRODUCTION

Dr. Sklaroff files this Brief in furtherance of his ongoing effort to ensure compliance with the Master Settlement Agreement ["MSA"] by Philip Morris Incorporated ["PM"], a member of the Tobacco Industry ["TI"] that signed this document *inter alia* with the Attorney General ["AG"] of the Commonwealth of Pennsylvania ["CoP"].

## A. This Brief Meets Two Goals: To Respond To Appellee's Brief And To Render As Moot Appellee's Motion To Quash The Appeal.

This is filed in response to the two documents filed by Appellee PM on April 20, 2000. It subsumes the initial Brief—which presented argument in a format that facilitated refuting the Opinion and PM's views—through its reorganization into a unitary structure. It also encompasses arguments raised in PM's Brief, citing also those points on which PM remained silent. Finally, it mainstreams information filed both with the Commonwealth Court (regarding litigation intended to force the AG to enforce the MSA) and the United States Supreme Court (regarding litigation intended to amend the MSA).

This reformulation of previously-submitted arguments thereby renders as moot the motion to quash this appeal, despite the fact that the information conveyed therein was not appreciably altered in the process of generating this document. Appropriate citations of legal literature have been previously submitted, so this effort is again intended to yield a concise articulation of the inherent contradictions being promulgated by PM herein. Emphasized herein *seriatim* is that PM and the AG pledged to uphold the MSA; PM promptly violated it; the AG failed to enforce it; and both resist outside influence. [The AG predictably averred this, as documented in his recent filing; see Appendix.]

B. Dr. Sklaroff Intends To Modify—Not Derail—The Master Settlement Agreement Through Three Distinct Litigation Efforts.

The AG sued the TI in his official and representative capacity "pursuant to his authority under 71 Pa.C.S. 732-204, 73 Pa.C.S. 201-204 and 73 Pa.C.S. 201-208 and in *parens patriae* on behalf of the citizens of Pennsylvania, including its children and adolescents, to protect their health and welfare, and to recover damages the Commonwealth **and its citizens** have sustained as a result of the unlawful and concerted action of the defendants, as well as injunctive relief." Yet, the courts failed to weigh the merits of the MSA to ensure it was fair, reasonable and adequate. Were they to have discharged this duty, they would have found two clauses (immunity and offset)—individually and collectively—to be complex, excessively ambiguous, *ultra vires*, overly-broad, and inconsistent with public policy.

Thus, Dr. Sklaroff sued to attain standing to alter the MSA. When PM financed Wawa billboard advertising and the AG failed to enforce the MSA, he sued PM. When it was claimed that only the AG could enforce the MSA, he sued the AG to attain this end. Thus, on the one hand, Dr. Sklaroff is attempting to ensure compliance with the MSA; on the other hand, Dr. Sklaroff is attempting to modify its egregious phraseology.

C. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene In Each Of These Cases, Under State And Federal Law, Based Upon His Current & Future Civil And Due-Process Constitutional Rights.

The AG has failed to investigate and to prosecute PM for having abrogated the MSA; this relates both to its billboard advertising and its promotion of tobacco use among youth through both print advertising and mail solicitation. Dr. Sklaroff has been forced to act.

By having initiated a "Manufacturer Sponsored Promotion," PM violated the MSA's "Third Party" and "Billboard Advertising" sections; the AG acknowledged this violation, even as he focused on Wawa's having "reneged" on an agreement to cease and desist.

D. Dr. Sklaroff Hereby Appeals Two Decisions Rendered By The Lower Court: He Merits Standing And The Record Should Be Supplemented By Information That Refutes Alleged Mootness Of This Litigation.

The Opinion rejected standing because of the alleged mootness of the challenged conduct and because of the alleged inability to differentiate Dr. Sklaroff's status from that of the general public. Rejected also was an effort to supplement the record with documentation that the challenged conduct was ongoing; the latter occurred without explanation. Thus, this appeal is intended to reverse both decisions with particular regard to the billboards—thereby permitting discovery of the contractual relationship between Wawa and PM—and with regard also to other facets of PM conduct which putatively violate the MSA. That this suit allegedly doesn't test the limits of the MSA's Release Clause is irrelevant; the double-goal was to see that the MSA was enforced (enjoining and fining PM) and to show the TI must not be provided immunity for future behavior that might be portrayed as pursued in the course of normal business activity (a behavioral "black hole").

## II. SCOPE AND STANDARD OF REVIEW

This review of a trial court's sustaining of preliminary objections in the nature of a demurrer is plenary; they should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. The Superior Court will reverse this decision only if the Trial Court committed an error of law or an abuse of discretion. [PM's citation of this responsibility was co-adopted.]

## III. STATEMENT OF QUESTIONS INVOLVED

A. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene, Based Upon His Current And Future Civil And Due-Process Constitutional Rights.

1. Dr. Sklaroff Is A Party Affected By The MSA.

2. Dr. Sklaroff Has Standing As A Taxpayer To Enforce The MSA.

B. The Complaint Should Not Be Dismissed Because The Claims It Seeks To Adjudicate Have Not Become Moot.

1. An Actual Case Or Controversy Remains "Live."

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D. Dr. Sklaroff Attached Writings.

E. The Record Should Be Supplemented By Information That Refutes The Alleged Mootness Of This Litigation.

## IV. STATEMENT OF THE CASE

As was noted by PM, this case was initiated due to PM's alleged violations of the MSA, sustained due to the AG's failure to ensure the challenged conduct didn't recur, and appealed due to the lower court's order affirming PM's preliminary objections. As was not noted by PM, this appeal encompasses also the decision of Judge Herron to refuse to allow the record to be supplemented by incontrovertible evidence of PM's recidivism.

## V. SUMMARY OF THE ARGUMENT

The lower court committed an error of law and abused its discretion when it sustained PM's preliminary objections to Dr. Sklaroff's complaint and when it refused to allow the record to be supplemented by proof that Dr. Sklaroff's complaint was not moot.

Dr. Sklaroff has standing to enforce the MSA (both directly and through the UTPCPL) because he is a third-party beneficiary, and he functions *inter alia* as a Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant. PM and the AG would now deny him standing to enforce the MSA, concomitant to prior efforts of these Settling Parties to deny him standing to amend it so he could be empowered to enforce it.

Although the initial PM-sponsored promotion ended in May, 1999 (with voluntary removal of the billboards), it predictably recurred in December, 1999 (due *inter alia* to the absence of an Injunction or a Stipulation that this behavior not be permitted). . .and this conduct was amplified both within Pennsylvania (by Sheetz) and nationally (in four other states: California, Kentucky, New Mexico, Wyoming). It presumably continues.

# VI. ARGUMENT

PM has corrupted Dr. Sklaroff's previously-detailed points, instead of refuting them. Indeed, PM failed to address the *italicized* critique of each point made in the Opinion; rather, PM misrepresented fundamental concepts clearly articulated in prior briefs.

## A. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene, Based Upon His Current And Future Civil And Due-Process Constitutional Rights.

PM failed to address (let alone refute) extensively-documented "standing" arguments based both on tobacco-related activity and generic medical-political activity. Indeed, Dr. Sklaroff finds it difficult to conjure what else he could/should do or have done to attain standing in myriad Pennsylvania courts. And PM noted it would not have to comply with any subsequent action(s), even were Dr. Sklaroff to force the AG to act.

### 1. Dr. Sklaroff Is An Intended Beneficiary Of The MSA.

PM averred that Dr. Sklaroff failed to allege he has standing as a third-party beneficiary to the MSA. This is not true but, rather than dispute PM, the allegation is hereby issued. Dr. Sklaroff has this status because the Settling Parties expressed an intention to benefit the third party (as a CoP citizen) and the MSA purportedly has been generated to satisfy their obligation to give *inter alia* Dr. Sklaroff the benefit of the promised performance[1].

[1] PM argues "the MSA does not express an intention to benefit Sklaroff; on the contrary, it expressly limits its enforcement to the attorneys general of the Settling States, including Pennsylvania."

PM quoted two cases to yield the conclusion that contractual language should determine whether any third-party beneficiary had rights; this, however, begged the question, inasmuch as such language isn't *sui generis* controlling; despite its existence, contacts and wills (e.g., Girard College) have been punctured, let alone court-approved settlements.

PM tries to marginalize this effort to gain standing, failing to address other recognized methods by which such status may be attained. Dr. Sklaroff would act as *parens patriae*, on behalf of his 9-3/4 year-old son, who most definitely is a **named** beneficiary of both the original complaint and the subsequent MSA. Dr. Sklaroff would act as would a physician-activist who is attempting to litigate so as to enforce (and to fix) the MSA. Yet, PM fails to address all these reasons for standing along with others averred previously (e.g., having achieved this status after having challenged the consolidation of the Blues). Finally, PM fails to address views articulated by Commonwealth Court Judge Kelley, particularly with regard to the necessity to empower **someone** to represent youth's views.

Paradoxically, after having argued Dr. Sklaroff lacks standing, regardless of his posture, PM then argues Dr. Sklaroff pleads an interest common to all Pennsylvanians. To do this, PM again selectively excerpts from Dr. Sklaroff's prior statements. It accurately quotes Dr. Sklaroff's assertion of "a direct, substantial and immediate interest in the necessity for PM to comply with the MSA," but then ignores other averments demonstrating that he is "aggrieved" by its actions against youth (**both** his son **and** all children in the

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This is an obvious *non sequitur*, inasmuch as intent to benefit Dr. Sklaroff (i.e., by providing *inter alia* allocated payments) need not be manifest solely as whether Dr. Sklaroff is empowered to enforce its tenets. That PM argues the MSA is not intended to benefit **any** citizen contradicts public statements regarding alleged corporate goals. And that PM portrays an unrelated MSA quotation by Dr. Sklaroff as proving a recognized enforcement limit is most disingenuous, inasmuch as the MSA was cited for completeness, within a different context.

CoP), and that he has sought both an injunction and damages correlative to this pattern of conduct (which is ongoing and yields the view that PM is able to violate the MSA with abandon).

2. Dr. Sklaroff Has Standing As A Taxpayer To Enforce The MSA.

PM accurately quotes Biester when noting that a taxpayer may establish standing when his interest is not substantial, direct or immediate when he is challenging certain governmental actions. It then notes that, to have this type of standing, a plaintiff must still "allege and prove an interest in the outcome of the suit which surpasses 'the common interest of all citizens in procuring obedience to the law.' " PM concludes otherwise, and thereby fails to "reach" (let alone refute) the five criteria Dr. Sklaroff alleges he meets[2].

Not withstanding previously-articulated argument that Dr. Sklaroff has interests that are separate and distinct from those of the public, PM also avers Dr. Sklaroff doesn't merit taxpayer standing because he is allegedly not challenging "an obligation placed on the general public or an emolument given through the exercise of governmental power." Specifically, PM avers cases recognizing taxpayer standing "have necessarily involved claims against some form of governmental authority or activity." PM then concludes that "Pennsylvania courts have not permitted taxpayer standing for private plaintiffs seeking to enforce the terms of a government contract in which the taxpayer-plaintiff is neither a party to nor a beneficiary of the agreement," and that Dr. Sklaroff doesn't merit standing.

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[2] A Taxpayer-plaintiff must plead and prove that: (1)—the governmental action in question would otherwise go unchallenged; (2)—those directly affected are beneficially affected; (3)—judicial relief is appropriate; (4)—redress through other channels is unavailable; and (5)—no other party is better situated to assert the claim.

PM ignores Dr. Sklaroff's claims that he is challenging exercise of governmental power (i.e., the power to settle), that litigating is a form of "governmental authority or activity," and that he claims he is a third-party beneficiary of the MSA (*vide supra*).

Instead, PM argues that "members of the public are merely incidental beneficiaries of a government contract and have no actionable rights thereunder." In PM's view, "The interpretation and administration of a contract. . .is not an obligation placed on the general public or an emolument given to the exercise of governmental power. Governmental officials, not taxpaying members of the public, are charged with interpreting public contracts." Yet, none of these arguments or citations allow for **exclusive** control of this entire process by public officials, particularly when the document in-question is a court-approved document, not just a contract.

Predictably, PM argues Dr. Sklaroff is suing the "wrong party" to gain taxpayer standing, without citing a cogent reason why this conclusion is justified. That it cannot cite any statute that supports this restrictive view illustrates why it is a "reach." And that PM has not refuted any of the five, unqualified Biester criteria speaks to their being controlling.

B. The Complaint Should Not Be Dismissed Because The Claims It Seeks To Adjudicate Have Not Become Moot.

Inexplicably, PM applauded the lower court for having "correctly" concluded that Dr. Sklaroff's complaint was moot because Wawa had removed the Marlboro billboards. "The mootness doctrine requires that 'an actual controversy must be extant at all states of review, not merely at the time the complaint is filed." However, an otherwise moot case may nonetheless still be resolved by the court in one of three narrow instances: (1)—when the case involves questions of great public importance; (2)—when the conduct complained

of is capable of repetition yet avoiding review; or (3)—when a party to the controversy will suffer some detriment without the court's decision.

Previously, Dr. Sklaroff showed how this case meets all three of these criteria; thus, alleged mootness should be discounted under the current circumstances.

1. An Actual Case Or Controversy Remains "Live."

In this situation, however, the billboards returned, and were amplified by additional billboards of comparable content and funding (by PM) both in the CoP and elsewhere. Thus, empiric argument that the controversy persisted after May, 1999, was prescient. Therefore, it is uncanny that the lower court chose to ignore evidence of this conduct, choosing instead simply to reaffirm his order following filing of a motion to reconsider.

2. A Reasonable Expectation Persists That The Wrong Will Recur.

After the AG noted that Wawa had "reneged" and after the national nature of this conduct had been documented, the fact that the AG's jawboning failed to influence the behavior either of PM or of the retailer/distributor illustrates why such conduct not only can recur but, indeed, is undoubtedly continuing to occur. Thus, the AG's inaction causes damage. Even were this not the case, one could envision a scenario in which PM violates the MSA sporadically, ceasing after a filing, recurring thereafter. A fine and injunction are needed.

In a footnote, PM grudgingly noted the evidence that disproves its angelic self-portrayal, yet it refuses to acknowledge that it could be invoked to allege a pattern of conduct. And in another footnote, it is alleged that, unlike Dr. Sklaroff, plaintiffs in other cases asserted that the action at-issue could escape review in the future and that they could

suffer some detriment without immediate judicial action. Dr. Sklaroff indeed has made these charges.

The key public policy concern is whether PM can be trusted to abide by the gigantic MSA despite violations that already have occurred. It agreed to remove tobacco billboards because it agreed children who read them are more apt to smoke. By its own admission, therefore, its funding of Wawa ads will generate more tobacco-addicted children.

C. Dr. Sklaroff's Claims Under The UTPCPL Should Not Be Dismissed.

PM notes that Dr. Sklaroff didn't buy any Marlboro cigarettes, nor could he have suffered any damages as a result of having used this product. Yet, PM fails to note that he can use the UTPCPL as a Private Attorney General on behalf of the public, seek an appropriate injunction as a result, and promulgate allegations of fraud that suffice for such a claim.

1. Dr. Sklaroff Can Invoke UTPCPL As A Private Attorney General.

"The UTPCPL does not explicitly provide for representative, group or class actions," according to PM. As has been the TI's classic argument, PM argues that this would be impermissible, anyway, "because of the necessity of showing that each person in the class acted in reliance upon PM's alleged misrepresentations." The former argument is refuted by a recent action in California; the latter is refuted by the Engle Case in Florida.

A recent (4/3/2000) ruling in San Diego, California[3] noted that standing as a private-AG was readily and fully

[3] "Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." § 17200, *et seq.*[3]. Comparable statutes exist in

available under the "Business and Professions Code." Daniels *et al* v. Philip Morris, *et al*, [SDSC Case # 719446]. This could also be granted in the CoP.

2. Dr. Sklaroff Can Seek Injunction As A Private Attorney General.

PM argues that only the AG or a District Attorney may seek an injunction; it ignores the fact that Dr. Sklaroff has cited the UTPCPL as justification to function as a private-AG.

3. Dr. Sklaroff's Allegations Of Fraud Suffice For A UTPCPL Claim.

PM contends Dr. Sklaroff must allege (1) misrepresentation; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded; and (5) damages to the party defrauded as a proximate result. These specific conclusions can be drawn after review of the PM-Wawa contract, with particular regard to how billboards were to be used to promote the use of tobacco by children. Such data have been gleaned from PM's secret memos, when it promoted deceptive and confusing advertising and when it misrepresented tobacco as having benefits and qualities that it does not have. These criteria are already met in this matter, inasmuch as the potential for billboard ads to entice children to smoke served as the basis for PM to have agreed to foreswear their use (in the MSA). And specific examples of PM's youth promotion also meet these criteria, inasmuch as PM has admitted that any such youth-directed ads misrepresented youth's ability to decide to smoke; that inclusion in magazines or receipt by mail led them to be read; that the inappropriate goal was to get kids to smoke; that some kids would smoke as a result;

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the CoP, such as the UTPCPL (73 P.S. § 201-4) that authorizes the AG to seek injunctive relief to enjoin fraudulent trade practices.

and that kids would get sick (immediately or later) as a result of having smoked.

C. Dr. Sklaroff Attached Writings.

Documentation of PM's conduct was provided pictorially (with copies that had sufficient clarity to demonstrate its abhorrent conduct, both in the CoP and elsewhere in the U.S.), and the availability of videotape documentation of PM's false assertions was articulated.

D. The Record Should Be Supplemented By Information That Refutes The Alleged Mootness Of This Litigation.

Dr. Sklaroff attempted to supplement the record with documentation of PM's recidivism, but Judge Herron inexplicably denied this motion. Inasmuch as it *a priori* disproves mootness, such behavior reflects abuse of discretion that led to his drawing an erroneous conclusion of law (i.e., that the conduct had been limited to one remote period in May). Therefore, it should be included, with the opportunity to explain-it-away provided to PM.

## VII. CONCLUSION

Judge Kelley concluded [***emphasis*** in the original document] regarding the MSA:

> The record in this case is absolutely devoid of ***any*** evidence establishing the damages suffered by the Commonwealth through its agencies, departments, commissions or divisions, ***and*** its 67 counties, ***and*** its various municipalities, cities, boroughs, townships, entities, instrumentalities and educational institutions. Thus, from this record, there is absolutely no way to determine the adequacy or appropriateness of the proposed settlement

> in this case. In the absence of ***any*** evidence to support this determination, the trial court was absolutely precluded from possessing the sufficient necessary information to permit an intelligent decision prior to accepting and endorsing settlement in this case.

These issues are explored in the Writ; the key point in this case is that the MSA intended to yield no further litigation against the TI. Extinguishing the rights of youth was to carry an enormous fiscal and operational benefit for the TI, including PM. And within a year, the "returns" have already been manifest; the CoP's AG did nothing to disturb the new power-balance that had been created. That's why the MSA is problematic, and that's why Dr. Sklaroff is merely applying it and documenting the response elicited from PM and the AG ("Stay away from our private deal!") a year after they pledged to adhere to it. Amazingly, the AG has arrogantly failed even to **pretend** to investigate these complaints.

Because the MSA has not achieved a "state specific finality" level of approval and, thus, because Dr. Sklaroff's efforts to remove the "Releasing Parties" clause persist unabated, Dr. Sklaroff is not precluded from suing PM under the MSA. Regardless of the seismic impact of Judge Kelly's Opinion, the fact remains that his step-by-step analysis of the MSA allows for the filing of litigation such as that being pursued in the instant matter. Only following exhaustion of all appeals, would it be appropriate for Dr. Sklaroff to be subject to the MSA's constraints. Indeed, although PM has released monies to the CoP, "State Specific Finality" includes "(3) . . .in the event of an Appeal, . . . [it] has become no longer subject to further Appeal (including, without limitation, review by the United States Supreme Court." [MSA, II (ss)] Thus, Dr. Sklaroff attempts to ensure PM abides by its professed desire to ban tobacco billboard ads. . .and thus encounters a buzz-saw.

That Dr. Sklaroff merits standing has been exhaustively demonstrated; many facets thereof remain unrefuted (e.g., meeting Biester), and other facets thereof have been misrepresented (e.g., the MSA being court-approved—not merely a contract—and the status afforded third-party beneficiaries being provided to Dr. Sklaroff). That this case is hardly moot has also been exhaustively documented, inclusive of materials that have inexplicably been excluded from the record. That Dr. Sklaroff can attain the status of a private-AG has been referenced, particularly because statute doesn't forbid his using it. That Dr. Sklaroff has pled the UTPCPL with particularity has been elucidated herein. That his motion to supplement the record should be honored has been demonstrated, simply because PM otherwise has the capacity to argue incorrectly that the case is moot. And that PM failed to respond to other carefully-parsed quotes is quite telling.

Judge Kelly also concluded that:

> The trial court may not place its judicial imprimatur on a proposed settlement and consent decrees, and order the entry of judgment thereon, where the record utterly fails to demonstrate that it is a just and fair resolution to the matter. This particularly so where the proposed settlement and consent decrees are of such a broad expanse, so absolutely preclude future claims and liability, and may never be altered or amended in any manner by the court.

Yet, this prescient opinion threatens to play-out in the instant case. As the AG invokes prosecutorial discretion to avoid pursuing MSA violations by PM, PM enjoys immunity. As PM avoids scrutiny by anyone else, it is empowered to ignore the MSA with abandon. And as the trial court blithely and blindly and consciously ignores data that disprove its faulty assumptions, probing PM's conduct is rightly transformed from moot to mandated.

The only way to "moot" this case is either for the AG to discharge his duty, or for PM to admit error and foreswear future misconduct. The MSA is admittedly fatally flawed, but the Settling Parties agreed to follow it, but neither has. Dr. Sklaroff is merely discharging his civic duty, maximizing efforts to maintain the public health; he would welcome others relieving him of this responsibility, but others seem disinclined to perform their duties.

For all the foregoing reasons, Dr. Sklaroff's Complaint should not be dismissed, in its entirety, with prejudice. Of course, Dr. Sklaroff respectfully requests leave to amend his Complaint should any facet thereof be viewed by the Court as insufficiently pled.

Respectfully submitted,

3. Supplementary Analyses

## A. The Offset

Activists fear this offset will function as does a computer operating system: in the background, but in control of all identifiable processes. It undermines the public interest by requiring the Attorney General either to defend the Tobacco Industry defendant or to finance litigation outcome. Therefore, it prompts the Tobacco Industry to seek fiscal (rather than policy-oriented) concessions during settlement negotiations.

The Settling Parties cited to no precedent for how the offset provision was to be triggered and applied. Thus, an Internet-Search was initiated to discern whether reference to the word "offset" appeared in comparable legal documents. It was found to be a "General Business Term," used often within contexts comparable to this contract excerpt [Berchtold, IV.2.]: "The customer may offset payment only against claims that are undisputed or legally established."

Governmental regulations invoked this term when the monies involved had been generated in a comparable (if not identical) fashion. The Treasury Department defined an "administrative offset" when the Federal Government is required "to withhold or reduce certain Federal payments to satisfy the delinquent non-tax debts owed to the United States by the payee." Federal Register 63(81):23353-23359. Another cited an "IRS offset" (Scenario #2). Office of Child Support Enforcement. OCSE-AT-98-15.

Arizona's Wage Statute mandated "the employer cannot offset debts that are unrelated to employment" when "withholding wages." A.R.S., ¶ 23-351. The SEC uses "offset" as a tag in submission headers and defines it as "when the fee or part of the fee is paid with another." The EDGAR System. Sect. B (4.9.3). It may grant "Tax Offset Payments" when a contract is submitted to the SEC. SEC Form S-8 [4(a)].

**None portrayed a scenario in which monies are paid to provide immunity without the need to write an insurance policy** (a task that would necessitate acquiring and exercising a Certificate of Authority from the CoP Insurance Department) **as is contemplated by the Settling Parties.**

Application of this concept was explored with relation to Federal Indemnification of manufacturers of vaccines that, rarely, could cause severe allergic reactions. National Swine Flu Immunization Program of 1976. P.L. 94-380. Senate Report No. 94-1147 noted that the concept of immunizing manufacturers was unprecedented; thus, this program is amenable to comparison & contrast with that contemplated by the MSA. A subsequent American Medical Association Report[4] noted it had also proven fiscally successful.

The purpose of this program **contrasts** with that touted by the MSA's proponents; whereas the MSA omits an Admissions section that could simplify its interpretation, Congress articulated the lofty and specific goals of the Vaccine Immunization Program[5].

The fact that it was submitted for legislative approval **contrasts** with the MSA. Its detail **contrasts** with the vague terminology in the MSA's tenets.

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[4] The Policy Compendium (#H-440.929) cites Board of Trustees Report "QQ" (A-93) ("Update on the National Childhood Vaccine Injury Act of 1986") which notes the budget surplus.

[5] "To achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute, and administer the swine flu vaccine purchased and used in the swine flu program and to assure the availability of such vaccine in interstate commerce, it is necessary to protect such agencies, organizations, and individuals against liability for other than their own negligence to persons alleging personal injury or death arising out of the administration of such vaccine. . . .

"To provide such protection and to establish an orderly procedure for the prompt and equitable handling of claims by persons alleging such injury or death, it is necessary that an exclusive remedy for such claimants be provided against the United States because of its unique role in the initiation, planning and administration of the swine flu program. . . .

Honoring constitutional separation-of-powers considerations (during a public health epidemic) **contrasts** with the effort to achieve expeditious approval of the MSA (during a public funding compulsion). Its mandate that all such claims were to be asserted directly against the United States **contrasts** with the mandate in the MSA that the Tobacco Industry "reasonably defend" such litigation.

Its mandate that "any insurance premium amount which is included in the price of such procurement contract and which is refunded to the manufacturer under any retrospective, experienced-rating plan or similar rating plan shall, in turn, be refunded to the United States," **contrasts** with the absence of any such reporting requirement by the Tobacco Industry (to the Food and Drug Administration or, for that matter, to any regulatory entity) under the MSA.

**Unlike the MSA,** corporate beneficiaries of a government indemnification program were obligated to calculate its price and to ensure the government wasn't penalized as a result thereof. Thus, that government immunized vaccine manufacturers who were producing a product that would benefit the public health without offsetting any type of payment **contrasts** with the fact that the Attorney General did not submit evidence setting the value of (past, present and future) claims against the Tobacco Industry.

Spokespeople representing state government and the Tobacco Industry have publicly disagreed regarding the applicability of the offset to cases raised in Pittsburgh and Philadelphia. Because granting this Writ of Certiorari will predictably yield clarification of this problem, it should be granted, so as to satisfy both legal issues and public policy concerns.

## References

American Medical Association Policy Compendium
#H-440.929 [Board of Trustees Report QQ (A-93)]

A.R.S.
Arizona's Wage Statute ¶ 23-351

Berchtold
General Terms of Business
http://www.berchtold.de/berchtold/2/agb.htm

The EDGAR System SEC Manual Sect. B (4.9.3)
http://edgar.stern.nyu.edu/sponsors/sec_manual/I-chap4b.pl.toc.html

The Debt Collection Improvement Act of 1996
Federal Register 681:23353-23359 (4/28/98)

National Swine Flu Immunization Program of 1976
P.L. 94-380

Office of Child Support Enforcement
OCSE-AT-98-15

Securities and Exchange Commission
Form S-8 [¶ 4(a)]
http://www.investquest.com/iz/a/ainn/fin/other/ainns801.txt

## B. Other Potential Causes of Action

**Dr. Sklaroff can articulate another cause-of-action based upon the MSA justifying a taxpayer suit.**

It would be intended to prohibit settlement monies from being tax-deductible, quietly denying the TI a $40 billion windfall unless taxpayers revolt (as they did when Congress adopted com-parable legislation prior to the 1998 summer recess). [This law was disavowed by the bipartisan leadership (and President), and rescinded after Labor Day.]

Despite the fact that excise taxes don't cover non-Medicaid tobacco-related expenses, any effort to raise them would not occur because all monies raised by that mechanism would then trigger "a continuing dollar-for-dollar offset" against the annual payments by the Tobacco Industry to the states. [see Section X: "Effect of Federal Tobacco-Related Legislation"]. These are depicted in the MSA, thusly:

> ...(b) The offset described in subsection (a) shall apply only to that portion of Federal Funds, if any, that are either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control or enforcement).

Justification for such tax increases is invariably linked to implementation along the above-stated lines. The net effect of this phraseology to capitate payments if the Federal Government raises taxes.

It is quite plausible that, otherwise, Congress might wish to finance additional tobacco-related expenditures. Dr. Sklaroff, as a non-smoker and as a taxpayer, would want to maximize tax revenue collected from smokers for two reasons: to limit his own fiscal liability for smokers' self-inflicted damages and to decrease youth smoking (due to consequent total price increases). Thus, he would want to be able to litigate this issue.

**Dr. Sklaroff has the legal right to seek relief on behalf of and/or generally applicable to the general public by filing generic litigation.**

The Petitioners' Brief cited numerous causes of action—in Pennsylvania and throughout America—which could be and have been filed in Pennsylvania against the Tobacco Industry. Dr. Sklaroff could serve as the plaintiff in these cases, all of which have passed muster as causes-of-action. These cases have Legally Enforceable Interests that are also amenable to being prosecuted by other activists.

Possible future litigation exemplifying what they could legally now assert—but which could become problematic under the spell of the MSA—include the following:

If the Tobacco Industry tried to circumvent advertising restrictions (e.g., promoting a new cigarette brand that shares the name of a parent entity), Dr. Sklaroff could file an intervention comparable to the successful effort by a public interest plaintiff against "Joe Camel." Mangini v. R. J. Reynolds Tobacco Company, *et al.*, 875 P 2d 73 (Cal. 1994).

Dr. Sklaroff has provided healthcare to Pennsylvania's Medicaid, medically indigent and non-paying patients and, thus could file a case comparable to that of a hospital group. Allegheny General Hospital, *et al* v. Philip Morris, Inc., *et al.*, Court of Common Pleas of Allegheny County, Civil Division GD No. 98-018956 (1998).

Dr. Sklaroff has provided consultative support for the litigation filed against the use of mentholated cigarettes. Reverend Jesse Brown, *et al.* v. Philip Morris, Inc., *et al.*, U.S. District Court for the Eastern District of PA, Civil Action No. 98-5518.

He could provide scientific support for a suit filed by a group of smokers seeking cessation programs. Sweeney, *et al.* v. American Tobacco Company, *et al.*, Court of Common Pleas of Allegheny County, No. 98-16226. And this medical approach could easily be provided to a group of smokers of low-tar/low-nicotine cigarettes. McNamara, *et al.*, Court of Common Pleas of Montgomery County No 98-13501.

In such **non-hypothetical matters**, Tobacco Industry defendants have been unable to dislodge plaintiffs from pursuing actions Dr. Sklaroff could pursue. Causes of action pursued successfully in other states could also be invoked in Pennsylvania related, for example, to environmental tobacco smoke protection and divulging additives. Regarding the former, established literature suggests ETS causes cancer and heart disease; recent literature shows bartenders' lung function rapidly improves when their workplaces are smoke-free. Regarding the latter, established literature suggests that ingredients may enhance carcinogenicity, overall toxicity, and the risk of residential fires; recent literature suggests the Tobacco Industry knew in 1961 that such biologically active materials are cancer-causing and -promoting.

Faulty facets of the MSA could be enjoined, such as advertising promoted by the Tobacco Industry against youth smoking, now shown to have been counterproductive (as the Tobacco Industry intended).

Anti-tobacco activism has roots in the nicotine addiction literature, also yielding a potential source of litigation. Extensive research into the diagnosis and treatment of nicotine addiction is urgent (as per CDC recommendations), inasmuch as it is vital that all Americans learn that their health is immediately benefited following initiation of smoking behavior. Youth, in particular, must learn that smoking affects both longevity (with consequences experienced decades in the future) and current quality-of-life concerns. All Americans must learn that they are not invariably doomed if they smoked beyond their teens.

Antitrust suits could be filed against the Tobacco Industry—comparable both to the March 11, 2000 filing by RJR-Nabisco against Philip Morris and to others filed by smaller tobacco manufacturers—that the MSA would block the Attorney General from pursuing.

Thus, parents, citizens, taxpayers, governments, and health-care providers must be able to hold the Tobacco Industry (Public Health Enemy #1) accountable for its deeds.

## C. Biester

Dr. Sklaroff warrants standing under the Biester taxpayer exception, even were his interests not substantial, immediate or direct. Under this exception, the taxpayer must show: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of expenditures beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no existence of other persons better situated to assert the claim. Biester, 487 Pa. at 443, 409 A.2d at 851 (1979). The relevant public policy is:

> The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. Such litigation allows the courts, within the framework of traditional notions of "standing," to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts. [Biester, 409 A.2d at 851 n.5.]

The Biester exception has been broadly applied. Taxpayers gained standing to challenge a new compensation law adopted by and for the state legislature because both no administrative agency was extant that was empowered to provide relief, and because legislators were felt "unlikely to provide a meaningful mechanism for redress." Consumer Party of Pennsylvania v. Com. of Pennsylvania, 507 A.2d 323 (Pa. 1986). A taxpayer gained standing to challenge two judicial vacancies appearing on the ballot in the 1988 general elections because "the only persons better situated to maintain this action are the respondents" who were deemed "directly and beneficially affected" and "who did not choose to institute legal action." Sprague v. Casey, 550 A.2d 184 (Pa. 1988).

A taxpayer gained standing to challenge an increase in the police commissioner's pension because no "prior, contemporaneous or even post notice was provided to Rizzo or any other taxpayer." Rizzo v. City of Philadelphia, 528 A.2d 1128 (Pa.Cmwlth. 1990). The plaintiffs' concerns related more to exertion of public policy than to enforcement of tax law.

Concerns of a more "fiscal" nature (an appropriations bill and a user fee) have also been successful. Taxpayers gained standing "because the very individuals who enacted such legislation are not going to be inclined to challenge the constitutionality of the process by which Act 1A was enacted." League of Women Voters of PA *et al* v. Commonwealth of PA *et al*. 692 A.2d 263 (Pa.Cmwlth. 1997). A trade association gained standing because at least one of its members would pay an impact fee, a tax. Building Industry Ass'n v. Manheim Township. 710 A.2d 141 (Pa.Cmwlth. 1998).

Recently, Commonwealth Court sustained the view that "taxpayers or organizations that represent Philadelphia taxpayers" merit standing during review of billboards at zoning hearings. Society Created to Reduce Urban Blight (SCRUB) *et al.* v. Zoning Board of Adjustment of the City of Philadelphia *et al*. (Filed 4/5/99). SCRUB's concerns are not limited to fiscal issues, a posture similar to that of Dr. Sklaroff.

Unaddressed but recognized in the SCRUB case were two additional reasons for granting standing: "zone of interest" and "private Attorney General." The former cited Ken R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1966) & Jefferson Bank v. Newton Associates, 686 A.2d. 834 (Pa. Superior Ct. 1966), and the latter cited Jones v. Muir, 511 Pa. 535 A.2d 855 (1986). The latter was defined as a party "who may not carry a substantial, direct or immediate interest in the subject matter of the litigation may be conferred with standing because he shares a common interest with citizens or taxpayers in general."

Regarding "Private Attorneys General," a recent (4/3/2000) ruling in San Diego, California is on-point. In Daniels *et al* v. Philip Morris, *et al*, [SDSC Case No. 719446], class certification was denied in an action intended to eliminate advertising and promotion of cigarettes that unlawfully encourages minors to smoke.

California citizens now have standing under the "Business and Professions Code," which defines "Unfair Competition" as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Comparable statutes exist in Pennsylvania.

For example, the UTPCPL (73 P.S. § 201-4) authorizes the Attorney General to seek injunctive relief to enjoin fraudulent trade practices that violate the statute.

Judge Ronald S. Prager's rationale:

> [T]he relief sought by Plaintiffs as identified by way of a review of the prayer for relief in the operative second amended complaint, for injunctive relief, resolution of funds conferred and disgorgement of ill-gotten gains, is readily and fully potentially available under the provisions of B & P § 17200, *et seq*. . . .Thus, an effective form of class-wide relief is available to fully compensate Plaintiffs in the event they prevail in the absence of class certification. [emphasis added]

## D. Cursory Analysis of the MSA

The substance of the MSA has not been subject to even the most superficial level of analysis merited by a contract of far less medical, economic, societal and legal significance. Protecting the interests of absent class members (minors, incompetents and incapacitants), the court must independently and objectively analyze the evidence and circumstances before it, in order to determine whether implementing a settlement is in the best interest of those whose claims will be extinguished. Newberg on Class Actions, section 11.40 (1985).

Neither this court nor any other in America addressed (let alone accomplished) this basic task. Allegheny County's Brief (pages 29-30) also detailed two ways that the MSA empowers the Attorney General to aid the Tobacco Industry in limiting future litigation.

The Opinion also failed to scrutinize the MSA to the degree necessary to "reach" assessment of such considerations as these: First, the CoP has retained and/or claimed the right to approve any future settlement which others might reach in their own right; they have potentially interposed a previously non-existent defense to the lawful pursuit of collective claims. Second, the CoP has contractually agreed not to assist or encourage, directly or indirectly, "any challenge to the [MSA] or any Consent Decree by any other person, and will support the integrity and enforcement of the terms of the Agreement and the Consent Decrees."

Also, the Opinion failed to address how the MSA obviates litigation such as by abridging citizens' rights to report wrongdoing by invoking centuries-old *qui tam* law. And it did not examine additional issues detailed throughout this writ that flesh-out how the Court responsible for administering the MSA envisions how it will discharge this duty.

This task was noted specifically during the MSA Hearings: "The Court in reviewing the consent decree looks at issues of fairness, reasonableness and adequacy for all the parties involved." [N. T. 1/8/99, page 18]. Yet, nowhere in the Opinion is it stated that these fundamental criteria were applied through independent review of the MSA; analysis was limited to specific concerns raised by the petitioners.

The Tobacco Industry Brief [page 9] unwittingly provided a key citation, however, the emphasis of which can be reformulated (by noting the presence of the qualifier "may"] to relegate this concern, properly, **below** that of determining standing: "An application for intervention **may** [not "must"] be refused if 'the intervention will unduly delay, embarrass or prejudice. . .adjudication of the rights of the parties,' " [Pa.R.C.P. 2329(3)]

**¶ II (pp) must be struck from the MSA.**

The Immunity Clause [paragraph II (pp)] clearly is overly-broad, unconstitutional, inconsistent with public policy and *ultra vires*. Yet, the AG has refused to explain why he refuses to offer a stipulation foreswearing his admitted inability to halt such suits.

He also failed to confront the possibility that future litigation could activate it. Thus, the AG lacks authority to grant immunity to the TI for a settlement of past, present and future claims when he refuses to interpret its basic tenets contemporaneously.

**¶ XII (b) must be struck from the MSA.**

Future claims could destroy whatever benefit the CoP stands to receive through the MSA, rendering it merit-less as a source of monetary recovery; private suits have sparked punitive damage awards that could occur if "other persons" (including organizations) to win public interest litigation.

This money would be subject to the offset. This practical expectation is justified, noting the evolutionary nature of jurisprudence.

The Attorney General has abdicated his responsibility to protect the citizenry under the above-cited consumer laws from past and future harm by the Tobacco Industry of unknown magnitude. The Attorney General does not have the constitutional discretion to ignore the will of the legislature and cede rights, powers and responsibilities on behalf of the CoP for at least the next quarter-century in exchange for a monetary settlement (of admittedly-variable and candidly-unknown value) and presumed good conduct (that he won't enforce). Attorney General is not "licensed" to "sell" liability insurance protection.

The MSA allowed the Tobacco Industry to place a fiscal windfall before state governmental officials, without limits on its appropriation. That these monies had been generated on behalf of youth—ostensibly, recompense for Medicaid expenses—was subordinated to efforts to fund pet projects, ranging from health-related research to filling potholes. Into this environment stepped activists, steeped in decades-long, heart-felt battles against the Tobacco Industry and those it funded; suddenly, a new "adversary" arose—state government—potentially ensconced in this role in perpetuity. Activists who would potentially obtain support chose to seek same, rather than to confront implications of receiving "The Devil's Money." The counter-argument, of course, is that the Tobacco Industry must pay for its legacy of disease, disability and death by redirecting its monies toward eradication of preventable illness (even if recipients can delink this work from tobacco control programs).